CHAPTER 89

COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT

Section

Note

Privatization; contracting of government services with the private sector (repealed June 30, 2007). L 2001, c 90, §2; L 2005, c 154.

Rules of Court

Applicability of Hawaii Rules of Civil Procedure, see HRCP rule 81(b)(12).

Case Notes

Chapter 92F not a "conflicting statute on the same subject matter" as this chapter, within the meaning of §89-19, and thus is not preempted by this chapter or any collective bargaining agreement negotiated under it. 83 H. 378, 927 P.2d 386.

Under this chapter, a public employee pursuing an individual grievance exhausts his or her administrative remedies when the employee completes every step available to the employee in the grievance process and a request to the employee's exclusive bargaining representative to proceed to the last grievance step, which only the representative can undertake, would be futile. 97 H. 528, 40 P.3d 930.

Chapter 89

Collective Bargaining in Public Employment

§89-1 Statement of findings and policy. (a) The legislature finds that joint decision-making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work; to provide a rational method for dealing with disputes and work stoppages; and to maintain a favorable political and social environment.

(b) The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by:

(1) Recognizing the right of public employees to organize for the purpose of collective bargaining;

(2) Requiring public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other conditions of employment, while, at the same time, maintaining the merit principle pursuant to section 76-1; and

(3) Creating a labor relations board to administer the provisions of chapters 89 and 377. [L 1970, c 171, pt of §2; am L 1985, c 251, §2; am L 2000, c 253, §92]

Case Notes

The broad policy statements within this section do not impose binding duties or obligations upon any parties but, rather, provide a useful guide for determining legislative intent and purpose; these statements, therefore, do not implicate the prohibited practice provision of refusing or failing to comply with any provision of chapter 89, as set forth in §89-13(a)(7); thus, employee's claim that employer

violated this section properly dismissed. 97 H. 528, 40 P.3d 930.

Order by Hawaii public employment relations board not in concert with policy and goals of collective bargaining, and constituted abuse of discretion. 5 H. App. 533, 704 P.2d 917.

§89-2 Definitions. As used in this chapter:

"Appropriate bargaining unit" means the unit designated to be appropriate for the purpose of collective bargaining pursuant to section 89-6.

"Arbitration" means the procedure whereby parties involved in an impasse submit their differences to a third party, whether a single arbitrator or an arbitration panel, for an arbitration decision. It may include mediation whereby the neutral third party is authorized to assist the parties in a voluntary resolution of the impasse.

"Board" means the Hawaii labor relations board created pursuant to section 89-5.

"Collective bargaining" means the performance of the mutual obligations of the public employer and an exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession. For the purposes of this definition, "wages" includes the number of incremental and longevity steps, the number of pay ranges, and the movement between steps within the pay range and between the pay ranges on a pay schedule under a collective bargaining agreement.

"Cost items" means all items agreed to in the course of collective bargaining that an employer cannot absorb under its customary operating budgetary procedures and that require additional appropriations by its respective legislative body for implementation.

"Day" means a calendar day unless otherwise specified.

""Employee" or "public employee" *[Repeal and reenactment on July 1, 2008. L 2005, c 245, §8.]* means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g).

"Employee organization" *[Repeal and reenactment on July 1, 2008. L 2005, c 245, §8.]* means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

"Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

"Impasse" means failure of a public employer and an exclusive representative to achieve agreement in the course of collective bargaining. It includes any declaration of an impasse under section 89-11.

"Jurisdiction" means the State, the city and county of Honolulu, the county of Hawaii, the county of Maui, the county of Kauai, the judiciary, and the Hawaii health systems corporation".

"Legislative body" means the legislature in the case of the State, including the judiciary, the department of education, the University of Hawaii, and the Hawaii health systems corporation; the city council, in the case of the city and county of Honolulu; and the respective county councils, in the case of the counties of Hawaii, Maui, and Kauai.

"Mediation" means assistance by a neutral third party to resolve an impasse between the public employer and the exclusive representative through interpretation, suggestion, and advice.

"Strike" means a public employee's refusal, in concerted action with others, to report for duty, or the employee's wilful absence from the employee's position, or the employee's stoppage of work, or the employee's abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, compensation, rights, privileges, or obligations of public employment; and except in the case of absences authorized by public employers, includes such refusal, absence, stoppage, or abstinence by any public employee out of sympathy or support for any other public employee who is on strike or because of the presence of any picket line maintained by any other public employee; provided that, nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to the conditions of employment. [L 1970, c 171, pt of §2; am L 1977, c 159, §16; am L 1980, c 252, §1; am L 1981, c 180, §2; am L 1984, c 254, §3; am L 1985, c 251, §3; gen ch 1985; am L 2000, c 253, §93; am L 2001, c 90, §8; am L 2002, c 232, §5; am L 2005, c 245, §3]

Note

In definition of "collective bargaining", reference is made to "Hawaii public employees health fund" which is repealed chapter 87. For current provisions, see chapter 87A.

Revision Note

Numeric designations deleted and definitions rearranged.

Attorney General Opinions

Cost items are those that require new or additional appropriation for implementation. Att. Gen. Op. 72-10.

Case Notes

Dates upon which plaintiffs were paid not a "cost item" as that term is defined in this section. 125 F. Supp. 2d 1237.

"Impasse" means failure after good-faith negotiations. 56 H. 85, 528 P.2d 809.

Though designated as an "incumbent" employee, plaintiff was "essential employee" where plaintiff: (1) received notice by same means as essential employee; (2) was prohibited from striking; and (3) was subject to discipline for not working if scheduled to work during a strike. 87 H. 191, 953 P.2d 569.

§89-3 Rights of employees. *[Repeal and reenactment on July 1, 2008. L 2005, c 245, §8.]* Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit contributions, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4. [L 1970, c 171, pt of §2; am L 1981, c 180, §3; am L 2000, c 253, §94; am L 2005, c 245, §4]

Attorney General Opinions

Unilateral wage increases by employer pending representation elections as constituting interference, restraint or coercion. Att. Gen. Op. 74-6.

Case Notes

Strike found unlawful and therefore not a protected activity under this section. 60 H. 361, 590 P.2d 993.

§89-3.5 Religious exemption from support of employee organization. Notwithstanding any other provision of law to the contrary, any employee who is a member of and

adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting employee organizations shall not be required to join or financially support any employee organization as a condition of employment; except that an employee may be required in a contract between an employee's employer and employee organization in lieu of periodic dues and initiation fees, to pay sums equal to the dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code, chosen by the employee from a list of at least three funds, designated in the contract or if the contract fails to designate any funds, then to any fund chosen by the employee. If an employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance-arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using the procedure. [L 1982, c 102, §1; am L 1983, c 124, §3]

§89-4 Payroll deductions. (a) Upon receiving from an exclusive representative a written statement specifying the amount of regular dues required of its members in the appropriate bargaining unit, the employer shall deduct this amount from the payroll of every member employee in the appropriate bargaining unit and remit the amount to the exclusive representative. Additionally, the employer shall deduct an amount equivalent to the regular dues from the payroll of every nonmember employee in the appropriate bargaining unit, and shall remit the amount to the exclusive representative; provided that the deduction from the payroll of every nonmember employee shall be made only for an exclusive representative which provides for a procedure for determining the amount of a refund to any employee who demands the return of any part of the deduction which represents the employee's pro rata share of expenditures made by the exclusive representative for activities of a political and ideological nature unrelated to terms and conditions of employment. If a nonmember employee objects to the amount to be refunded, the nonmember employee may petition the board for review thereof within fifteen days after notice of the refund has been received. If an employee organization is no longer the exclusive representative of the appropriate bargaining

unit, the deduction from the payroll of members and nonmembers shall terminate.

(b) The employer shall, upon written authorization by an employee, executed at any time after the employee's joining an employee organization, deduct from the payroll of the employee the amount of membership dues, initiation fees, group insurance premiums, and other association benefits and shall remit the amount to the employee organization designated by the employee.

(c) The employer shall continue all payroll assignments authorized by an employee prior to July 1, 1970 and all assignments authorized under subsection (b) until notification is submitted by an employee to discontinue the employee's assignments. [L 1970, c 171, pt of §2; am L 1981, c 180, §1; am L 1982, c 100, §1; gen ch 1985]

Revision Note

"July 1, 1970" substituted for "the effective date of this chapter".

Case Notes

Where plaintiff maintained that defendant union provided inadequate information to nonmembers prior to making union payroll deductions pursuant to this section in violation of Chicago Teachers Union v. Hudson, defendants were preliminarily enjoined from taking any action to demand and/or collect from plaintiff and class members, by any means, agency fees and from taking any other action to enforce subsection (a), until a mechanism for withdrawing agency fees that was in compliance with Hudson was devised by the parties and approved by the court. 269 F. Supp. 2d 1252.

Section held to be constitutional on its face since regulation of labor relations of state and local governments has been left to the states. 437 F. Supp. 368.

In the certification process for collective bargaining service fees, union not acting under color of state law. 472 F. Supp. 1123.

§89-5 Hawaii labor relations board. (a) There is created a Hawaii labor relations board to ensure that collective bargaining is conducted in accordance with this

chapter and that the merit principle under section 76-1 is maintained.

(b) The board shall be composed of three members of which (1) one member shall be representative of management, (2) one member shall be representative of labor, and (3) the third member, the chairperson, shall be representative of the public. All members shall be appointed by the governor for terms of six years each. Public employers and employee organizations representing public employees may submit to the governor for consideration names of persons to serve as members of the board and the governor shall first consider these persons in selecting the members of the board.

(c) Each member shall hold office until the member's successor is appointed and qualified. Because cumulative experience and continuity in office are essential to the proper administration of this chapter, it is declared to be in the public interest to continue board members in office as long as efficiency is demonstrated, notwithstanding the provision of section 26-34, which limits the appointment of a member of a board or commission to two terms.

(d) The members shall devote full time to their duties as members of the board. Effective July 1, 2005, the chairperson of the board shall be paid a salary set at eighty-seven per cent of the salary of the director of labor and industrial relations, and the salary of each of the other members shall be ninety-five per cent of the chairperson's salary. No member shall hold any other public office or be in the employment of the State or a county, or any department or agency thereof, or any employee organization during the member's term.

(e) Any action taken by the board shall be by a simple majority of the members of the board. All decisions of the board shall be reduced to writing and shall state separately its finding of fact and conclusions. Any vacancy in the board shall not impair the authority of the remaining members to exercise all the powers of the board. The governor may appoint an acting member of the board during the temporary absence from the State or the illness of any regular member. An acting member, during the acting member's term of service, shall have the same powers and duties as the regular member.

(f) The chairperson of the board shall be responsible for the administrative functions of the board. The board may appoint an executive officer, mediators, arbitrators, and hearing officers, and employ other assistants as it may deem necessary in the performance of its functions, prescribe their duties, and fix their compensation and provide for reimbursement of actual and necessary expenses incurred by them in the performance of their duties within the amounts made available by appropriations therefor. Section 28-8.3 notwithstanding, an attorney employed by the board as a full-time staff member may represent the board in litigation, draft legal documents for the board, and provide other necessary legal services to the board and shall not be deemed to be a deputy attorney general.

(g) The board shall be within the department of labor and industrial relations for budgetary and administrative purposes only. All members of the board and employees other than clerical and stenographic employees shall be exempt from chapters 76 and 89. Clerical and stenographic employees shall be appointed in accordance with chapter 76.

(h) At the close of each fiscal year, the board shall make a written report to the governor on its activities, including the cases and their dispositions, and the names, duties, and salaries of its officers and employees. Copies of the report shall be transmitted to the other chief executives, the exclusive representatives, and the legislative body of each jurisdiction.

(i) In addition to the powers and functions provided in other sections of this chapter, the board shall:

(1) Establish procedures for, investigate, and resolve, any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions;

(2) Establish procedures for, resolve disputes with respect to, and supervise the conduct of, elections for the determination of employee representation;

(3) Resolve controversies under this chapter;

(4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;

(5) Hold such hearings and make such inquiries, as it deems necessary, to carry out properly its functions and powers, and for the purpose of such hearings and inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by the issuance of subpoenas, and delegate such powers to any member of the board or any person appointed by the board for the performance of its functions;

(6) Determine qualifications and establish, after reviewing nominations submitted by the public employers and employee organizations, lists of qualified persons, broadly representative of the public, to be available to serve as mediators or arbitrators;

(7) Establish a fair and reasonable range of daily or hourly rates at which mediators and arbitrators on the lists established under paragraph (6) are to be compensated;

(8) Conduct studies on problems pertaining to public employee-management relations, and make recommendations with respect thereto to the legislative bodies; request information and data from state and county departments and agencies and employee organizations necessary to carry out its functions and responsibilities; make available to all concerned parties, including mediators and arbitrators, statistical data relating to wages, benefits, and employment practices in public and private employment to assist them in resolving issues in negotiations;

(9) Adopt rules relative to the exercise of its powers and authority and to govern the proceedings before it in accordance with chapter 91; and

(10) Execute all of its responsibilities in a timely manner so as to facilitate and expedite the resolution of issues before it.

(j) For the purpose of minimizing travel and per diem expenses for parties who are not located on Oahu, the board shall utilize more cost efficient means such as teleconferencing which does not require appearances on Oahu, whenever practicable, to conduct its proceedings. Alternatively, it shall consider conducting its proceedings on another island whenever it is more cost efficient in consideration of the parties and the witnesses involved. [L 1970, c 171, pt of §2; am L 1971, c 49, §1; am L 1974, c 17, §1 and c 116, §2; am L 1975, c 58, §11; am L 1976, c 41, §1; am L 1978, c 196, §1; am L 1982, c 129, §3; am L 1983, c 10, §1 and c 11, §1; am L 1985, c 251, §4; gen ch 1985; am L 1986, c 128, §3; am L 1989, c 329, §2; am L 1990, c 140, §3; am L Sp 1993, c 8, §53; am L 2000, c 253, §95; am L 2001, c 55, §5; am L 2002, c 232, §1; am L 2005, c 226, §3]

Attorney General Opinions

Member holding over will be a de jure, not merely a de facto, officer. Att. Gen. Op. 73-7.

Case Notes

Hawaii public employment relations board is entitled to quasi-judicial immunity. 472 F. Supp. 1123.

Hawaii public employment relations board was empowered to make declaratory ruling regarding whether violation of collective bargaining agreement is a prohibited practice. 60 H. 436, 591 P.2d 113.

Subsection (b)(4) cited as empowering board to resolve disputes between employees and their unions. 2 H. App. 50, 625 P.2d 1046.

§89-6 Appropriate bargaining units. *[Repeal and reenactment on July 1, 2008. L 2005, c 245, §8.]* (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

(1) Nonsupervisory employees in blue collar positions;

(2) Supervisory employees in blue collar positions;

(3) Nonsupervisory employees in white collar positions;

(4) Supervisory employees in white collar positions;

(5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent;

(6) Educational officers and other personnel of the department of education under the same pay schedule;

(7) Faculty of the University of Hawaii and the community college system;

(8) Personnel of the University of Hawaii and the community college system, other than faculty;

(9) Registered professional nurses;

(10) Institutional, health, and correctional workers;

(11) Firefighters;

(12) Police officers; and

(13) Professional and scientific employees, who cannot be included in any of the other bargaining units.

(b) Because of the nature of the work involved and the essentiality of certain occupations that require specialized training, supervisory employees who are eligible for inclusion in bargaining units (9) through (13) shall be included in bargaining units (9) through (13), respectively, instead of bargaining unit (2) or (4).

(c) The classification systems of each jurisdiction shall be the bases for differentiating blue collar from white collar employees, professional from institutional, health and correctional workers, supervisory from nonsupervisory employees, teachers from educational officers, and faculty from nonfaculty. In differentiating

supervisory from nonsupervisory employees, class titles alone shall not be the basis for determination. The nature of the work, including whether a major portion of the working time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees, shall be considered also.

(d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:

(1) For bargaining units (1), (2), (3), (4), (9), (10), and (13), the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the particular bargaining unit;

(2) For bargaining units (11) and (12), the governor shall have four votes and the mayors shall each have one vote;

(3) For bargaining units (5) and (6), the governor shall have three votes, the board of education shall have two votes, and the superintendent of education shall have one vote;

(4) For bargaining units (7) and (8), the governor shall have three votes, the board of regents of the University of Hawaii shall have two votes, and the president of the University of Hawaii shall have one vote.

Any decision to be reached by the applicable employer group shall be on the basis of simple majority, except when a bargaining unit includes county employees from more than one county. In such case, the simple majority shall include at least one county.

(e) In addition to a collective bargaining agreement under subsection (d), each employer may negotiate, independently of one another, supplemental agreements that apply to their respective employees; provided that any supplemental agreement reached between the employer and the exclusive representative shall not extend beyond the term of the applicable collective bargaining agreement and shall

not require ratification by employees in the bargaining unit.

(f) For the purposes of negotiating contributions by the State and the counties to a voluntary employees' beneficiary association trust as part of a collective bargaining agreement, all prospective retirees who retire on or after July 1, 2005, shall be considered members of the bargaining unit to which they belonged immediately prior to their retirement from the State or the counties.

(g) The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:

(1) Elected or appointed official;

(2) Member of any board or commission;

(3) Top-level managerial and administrative personnel, including the department head, deputy or assistant to a department head, administrative officer, director, or chief of a state or county agency or major division, and legal counsel;

(4) Secretary to top-level managerial and administrative personnel under paragraph (3);

(5) Individual concerned with confidential matters affecting employee-employer relations;

(6) Part-time employee working less than twenty hours per week, except part-time employees included in bargaining unit (5);

(7) Temporary employee of three months' duration or less;

(8) Employee of the executive office of the governor or a household employee at Washington Place;

(9) Employee of the executive office of the lieutenant governor;

(10) Employee of the executive office of the mayor;

(11) Staff of the legislative branch of the State;

(12) Staff of the legislative branches of the counties, except employees of the clerks' offices of the counties;

(13) Any commissioned and enlisted personnel of the Hawaii national guard;

(14) Inmate, kokua, patient, ward, or student of a state institution;

(15) Student help;

(16) Staff of the Hawaii labor relations board;

(17) Employee of the Hawaii national guard youth challenge academy; or

(18) Employees of the office of elections.

(h) Where any controversy arises under this section, the board, pursuant to chapter 91, shall make an investigation and, after a hearing upon due notice, make a final determination on the applicability of this section to specific individuals, employees, or positions. [L 1970, c 171, pt of §2; am L 1973, c 36, §1; am L 1975, c 162, §1; am L 1976, c 13, §1; am L 1977, c 191, §1; am L 1987, c 184, §1 and c 311, §1; am L 1988, c 394, §1 and c 399, §2; gen ch 1993; am L 1996, c 89, §5; am L 2000, c 253, §96; am L 2002, c 65, §4; am L 2005, c 202, §3 and c 245, §5]

§89-7 Elections. (a) Whenever, in accordance with regulations as may be prescribed by the board pursuant to chapter 91, a petition is filed by an employee organization to determine whether or by which organization employees desire to be represented for the purpose of collective bargaining, the board shall conduct an investigation and may conduct an election where appropriate as specified herein. A petition to decertify or to change the exclusive bargaining representative must be supported by fifty per cent of employees in an appropriate bargaining unit, through verifiable written proof of the names and signatures of employees. Signatures of employees supporting such a petition must be obtained within two months of the date of the petition to be valid with the board. In its investigation of the showing of interest, the board shall afford all interested parties a contested case hearing.

(b) In any election where none of the choices on the ballot receives a majority of the votes cast, a runoff election shall be conducted with the ballot providing for a selection between the two choices receiving the largest number of valid votes cast in the election. The board shall certify the election results and the employee organization receiving a majority of the votes cast shall be certified as the exclusive representative of all employees in the appropriate bargaining unit for the purpose of collective bargaining. The employee organization shall remain certified as the exclusive representative until it is replaced by another employee organization, decertified, or dissolved.

(c) No election shall be directed by the board in any appropriate bargaining unit within which (1) a valid election has been held in the preceding twelve months; or (2) a valid collective bargaining agreement is in force and effect.

(d) The board shall adopt rules and regulations consistent with this section governing the conduct of elections to determine representation, including the time, place, manner of notification, and reporting the results of elections, and the manner for filing any petition for an election and decertification election or any petition concerning the results of an election. No mail ballots shall be permitted by the board except when for reasonable cause a specific individual would otherwise be unable to cast a ballot. No names, addresses or information regarding the work location of employees eligible to vote shall be provided to employee organizations involved in an election. The board shall have the final determination on any controversy concerning the eligibility of an employee to vote. [L 1970, c 171, pt of §2; am L 1988, c 399, §3; am L 2000, c 253, §97]

Attorney General Opinions

Illegal and blank ballots are not counted in determining total number of votes cast. Att. Gen. Op. 71-8.

§89-8 Recognition and representation; employee participation. (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As

exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Any other provision herein to the contrary notwithstanding, whenever two or more employee organizations which have been duly certified by the board as the exclusive representatives of employees in bargaining units merge, combine, or amalgamate or enter into an agreement for common administration or operation of their affairs, all rights and duties of such employee organizations as exclusive representatives of employees in such units shall inure to and shall be discharged by the organization resulting from such merger, combination, amalgamation, or agreement, either alone or with such employee organizations. Election by the employees in the unit involved, and certification by the board of such resulting employee organization shall not be required.

(b) An individual employee may present a grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization; provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

(c) Employee participation in the collective bargaining process conducted by the exclusive representative of the appropriate bargaining unit shall be permitted during regular working hours without loss of regular salary or wages. The number of participants from each bargaining unit with over 2,500 members shall be limited to one member for each five hundred members of the bargaining unit. For bargaining units with less than 2,500 members, there shall be at least five participants, one of whom shall reside in each county; provided that there need not be a participant residing in each county for the bargaining unit established by section 89-6(a)(8). The bargaining unit shall select the participants from representative departments, divisions or sections to minimize interference with the normal operations and service of the departments, divisions or sections. [L 1970, c 171, pt of §2; am L 1971, c 212, §2; am L 1977, c 191, §3; gen ch 1985]

Case Notes

Where employee presented grievance to employer, was heard with respect thereto, and was notified that the remedy employee sought as an individual was denied, employer did not violate subsection (b) and the board was correct in determining that, on the relevant undisputed facts, the employer was entitled to summary judgment; thus, there was no §89-13(a)(7) or (8) prohibited practice violation of the collective bargaining agreement. 97 H. 528, 40 P.3d 930.

§89-9 Scope of negotiations; consultation. *[Repeal and reenactment on July 1, 2008. L 2005, c 245, §8.]* (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust to the extent allowed in subsection (e), and other terms and conditions of employment that are subject to collective bargaining and that are to be embodied in a written agreement as specified in section 89-10, but the obligation does not compel either party to agree to a proposal or make a concession; provided that the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001.

(b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other party in writing, setting forth the time and place of the meeting desired and the nature of the business to be discussed, sufficiently in advance of the meeting.

(c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

(d) *[Repeal and reenactment on July 1, 2008. L 2005, c 245, §8.]* Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust; recruitment; examination; initial pricing; and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal that would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or that would interfere with the rights and obligations of a public employer to:

(1) Direct employees;

(2) Determine qualifications, standards for work, and the nature and contents of examinations;

(3) Hire, promote, transfer, assign, and retain employees in positions;

(4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;

(5) Relieve an employee from duties because of lack of work or other legitimate reason;

(6) Maintain efficiency and productivity, including maximizing the use of advanced technology, in government operations;

(7) Determine methods, means, and personnel by which the employer's operations are to be conducted; and

(8) Take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

The employer and the exclusive representative may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit; the suspension, demotion, discharge, or other disciplinary actions taken against employees within the bargaining unit; and the layoff of employees within the bargaining unit.

Violations of the procedures so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

(e) *[Repeal and reenactment on July 1, 2008. L 2005, c 245, §8.]* Negotiations relating to contributions to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust shall be for the purpose of agreeing upon the amounts that the State and counties shall contribute under sections 87A-32 through 87A-37, toward the payment of the costs for a health benefits plan, as defined in section 87A-1 and group life insurance benefits, and the parties shall not be bound by the amounts contributed under prior agreements; provided that section 89-11 for the resolution of disputes by way of arbitration shall not be available to resolve impasses or disputes relating to the amounts the State and counties shall contribute to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust established under chapter 87D.

(f) The repricing of classes within an appropriate bargaining unit may be negotiated as follows:

(1) At the request of the exclusive representative and at times allowed under the collective bargaining agreement, the employer shall negotiate the repricing of classes within the bargaining unit. The negotiated repricing actions that constitute cost items shall be subject to the requirements in section 89-10.

(2) If repricing has not been negotiated under paragraph (1), the employer of each jurisdiction shall ensure establishment of procedures to periodically review, at least once in five years, unless otherwise agreed to by the parties, the repricing of classes within the bargaining unit. The repricing of classes based on the results of the periodic review shall be at the discretion of the employer. Any appropriations required to implement the repricing actions that are made at the employer's discretion shall not be construed as cost items. [L 1970, c 171, pt of §2; am L 1975, c 31, §1 and c 164, §1; am L 1980, c 253, §6; am L 1984, c 254, §1; gen ch 1985; am L 1986, c 156, §1; am L 1987, c 27, §4; am L 1988, c 399,

§4; am L 1993, c 364, §§16, 17; am L 1998, c 115, §13; am L 1999, c 100, §2; am L 2000, c 253, §98; am L 2002, c 232, §2; am L 2004, c 10, §4; am L 2005, c 245, §6]

Attorney General Opinions

Pursuant to this section and §304-11, board of regents may enter into a collective bargaining agreement providing for tuition exemption for faculty and staff members. Att. Gen. Op. 74-12.

Case Notes

Where dates upon which plaintiffs were paid were not a "cost item" as that term is defined in §89-2, plaintiffs' contention that timing of their paychecks as it stood on June 30, 1999 was continued another two years until July 1, 2001 by Act 100, L 1999 (which, inter alia, amended this section), lacked merit. Even if payroll lag was a cost item, the collective bargaining agreement expired on June 30, 1999; plaintiffs' rights under the collective bargaining agreement expired on that day. 125 F. Supp. 2d 1237.

Board was empowered to make declaratory judgment regarding validity of collective bargaining agreement. 60 H. 436, 591 P.2d 113.

Section does not bar arbitration of grievances over tenure and promotion. 66 H. 207, 659 P.2d 717.

Does not limit board's power to order union to implement staffing of essential positions. 66 H. 461, 667 P.2d 783.

Policy statement was not bargainable to the extent that it constituted compliance with the Drug-Free Workplace Act. Because the Act inherently mandated implementation, appellant need not wait until appellee attempted an implementation of an apparatus to effectuate the policy; because implementation would affect bargainable topics, appellant may initiate bargaining at any time upon such topics. 79 H. 154, 900 P.2d 161.

County did not violate collective bargaining statutes by refusing to bargain over effects of privatization where because privatization effort was contrary to law, it was outside scope of negotiable topics. 85 H. 61, 937 P.2d 397.

Section 2 of Act 100, L 1999 violated the rights of public employees under article XIII, §2 of the Hawaii constitution by amending this section to prohibit public employers and

public employees' unions from collectively bargaining over cost items for the biennium 1999 to 2001. 100 H. 138, 58 P.3d 649.

Section 2 of Act 100, L 1999 (which amended subsection (a)) violated article XIII, §2 of the Hawaii constitution because it withdrew from the collective bargaining process core subjects such as wages, hours, and other conditions of employment that the voters contemplated would be part of the bargaining process when they ratified article XIII, §2. 101 H. 46, 62 P.3d 189.

The general prohibition in subsection (d) against a public employer and the exclusive representative of a collective bargaining unit agreeing to a "proposal inconsistent with merit principles" is subject to this subsection's provisions allowing for, inter alia, negotiation of promotion and demotion procedures in a collective bargaining agreement and a grievance process for violation thereof; §76-1, Revised Charter of Honolulu §§6-302, 6-306, 6-308, and rules of the civil service commission §§13-2 and 13-3 do not conflict with subsection (d). 106 H. 205, 103 P.3d 365.

In light of the plain language of subsection (d), labor relations board erred in concluding that the city's proposed transfer of refuse workers from one location to another was subject to collective bargaining under subsection (a). 106 H. 359, 105 P.3d 236.

As subsection (d) precludes collective bargaining over classification issues and thus places them out of the reach of an arbitrator, who derived jurisdiction and authority from the collective bargaining agreement, arbitrator lacked arbitral jurisdiction. 101 H. 11 (App.), 61 P.3d 522.

Hawaii Legal Reporter Citations

Mandatory subjects of negotiation--classification plans. 78-2 HLR 78-939.

§89-10 Written agreements; enforceability; cost items. (a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned, except for an agreement reached pursuant to an arbitration decision. Ratification is not required for other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement, an agreement on reopened items, or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement shall be reduced to

writing and executed by both parties. Except for cost items and any non-cost items that are tied to or bargained against cost items, all provisions in the agreement that are in conformance with this chapter, including a grievance procedure and an impasse procedure culminating in an arbitration decision, shall be valid and enforceable and shall be effective as specified in the agreement, regardless of the requirements to submit cost items under this section and section 89-11.

(b) All cost items shall be subject to appropriations by the appropriate legislative bodies. The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the state legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. The state legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the state legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.

(c) Because effective and orderly operations of government are essential to the public, it is declared to be in the public interest that in the course of collective bargaining, the public employer and the exclusive representative for each bargaining unit shall by mutual agreement include provisions in the collective bargaining agreement for that bargaining unit for an expiration date which will be on June 30th of an odd-numbered year.

The parties may include provisions for reopening during the term of a collective bargaining agreement; provided that cost items as defined in section 89-2 shall be subject to the requirements of this section.

(d) Whenever there is a conflict between the collective bargaining agreement and any of the rules adopted by the employer, including civil service or other personnel policies, standards, and procedures, the terms of

the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d).

Whenever there are provisions in a collective bargaining agreement concerning a matter under chapter 76 or 78 that is negotiable under chapter 89, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d). [L 1970, c 171, pt of §2; am L 1975, c 162, §2; am L 1988, c 399, §1; am L 2000, c 253, §99; am L 2002, c 195, §1]

Attorney General Opinions

Cost items that require new or additional appropriation and positions that exceed the maximum position count must be submitted to Legislature. Att. Gen. Op. 72-10.

Legislature may reject cost items by failure to appropriate funds or by concurrent resolution or other means indicating views of both houses. Att. Gen. Op. 72-10.

Legislature has power to pass law increasing salaries of one unit of state employees, but it would be inconsistent with the collective bargaining law to do so. Att. Gen. Op. 74-6.

Case Notes

In interpretation of a collective bargaining agreement, extrinsic evidence of past practices and past interpretations is proper. 60 H. 513, 591 P.2d 621.

§89-10.5 Collective bargaining and local school initiatives. Notwithstanding any other law to the contrary, any collective bargaining agreement concerning public school employees may include terms that would allow an employee to work a longer period each day and a longer school year. Consideration of a longer school day or longer school year shall be related to state and local school initiatives and may be included in proposals submitted in connection with the incentive and innovation grant review process. [L 1993, c 364, pt of §11, §31; am L 1994, c 272, §34(2)]

§89-10.6 Schools; waiver of policies, rules, or procedures. Any school may initiate a waiver from policies, rules, or procedures, including collective bargaining agreements, as provided for in section 302A-

1126. [L 1993, c 364, pt of §11; am L 1994, c 272, §23; am L 1996, c 89, §6; am L 2004, c 51, §21]

[§89-10.8] Resolution of disputes; grievances. (a) A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable and shall be consistent with the following:

(1) A dispute over the terms of an initial or renewed agreement shall not constitute a grievance;

(2) No employee in a position exempted from chapter 76, who serves at the pleasure of the appointing authority, shall be allowed to grieve a suspension or discharge unless the collective bargaining agreement specifically provides otherwise; and

(3) With respect to any adverse action resulting from an employee's failure to meet performance requirements of the employee's position, the grievance procedure shall provide that the final and binding decision shall be made by a performance judge as provided in this section.

(b) The performance judge shall be a neutral third party selected from a list of persons whom the parties have mutually agreed are eligible to serve as a performance judge for the duration of the collective bargaining agreement. The parties, by mutual agreement, may modify the performance judge list at any time and shall determine a process for selection from the list.

(c) The performance judge shall use the conditions in section 76-41(b) as tests in reaching a decision on whether the employer's action, based on a failure by the employee to meet the performance requirements of the employee's position, was with or without merit.

(d) If it is alleged that the adverse action was not due to a failure to meet performance requirements but for disciplinary reasons without just and proper cause, the performance judge shall first proceed with a determination

on the merits of the employer's action under subsection (c). If the performance judge determines that the adverse action may be based on reasons other than a failure to meet performance requirements, the performance judge shall then determine, based on appropriate standards of review, whether the disciplinary action was with or without proper cause and render a final and binding decision. [L 2000, c 253, §91]

§89-11 Resolution of disputes; impasses. (a) A public employer and an exclusive representative may enter, at any time, into a written agreement setting forth an alternate impasse procedure culminating in an arbitration decision pursuant to subsection (f), to be invoked in the event of an impasse over the terms of an initial or renewed agreement. The alternate impasse procedure shall specify whether the parties desire an arbitrator or arbitration panel, how the neutral arbitrator is to be selected or the name of the person whom the parties desire to be appointed as the neutral arbitrator, and other details regarding the issuance of an arbitration decision. When an impasse exists, the parties shall notify the board if they have agreed on an alternate impasse procedure. The board shall permit the parties to proceed with their procedure and assist at times and to the extent requested by the parties in their procedure. In the absence of an alternate impasse procedure, the board shall assist in the resolution of the impasse at times and in the manner prescribed in subsection (d) or (e), as the case may be. If the parties subsequently agree on an alternate impasse procedure, the parties shall notify the board. The board shall immediately discontinue the procedures initiated pursuant to subsection (d) or (e) and permit the parties to proceed with their procedure.

(b) An impasse during the term of a collective bargaining agreement on reopened items or items regarding a supplemental agreement shall not be subject to the impasse procedures in this section. The parties may mutually agree on an impasse procedure, but if the procedure culminates in an arbitration decision, the decision shall be pursuant to subsection (f).

(c) An impasse over the terms of an initial or renewed agreement and the date of impasse shall be as follows:

1) More than ninety days after written notice by either party to initiate negotiations, either party may give written notice to the board that an impasse exists. The date on which the board receives notice shall be the date of impasse; and

(2) If neither party gives written notice of an impasse and there are unresolved issues on January 31 of a year in which the agreement is due to expire, the board shall declare on January 31 that an impasse exists and February 1 shall be the date of impasse.

(d) If an impasse exists between a public employer and the exclusive bargaining representative of bargaining unit (1), nonsupervisory employees in blue collar positions; bargaining unit (5), teachers and other personnel of the department of education; or bargaining unit (7), faculty of the University of Hawaii and the community college system, the board shall assist in the resolution of the impasse as follows:

(1) Voluntary mediation. During the first twenty days of the date of impasse, either party may request the board to assist in a voluntary resolution of the impasse by appointing a mediator or mediators, representative of the public from a list of qualified persons maintained by the board;

(2) Mediation. If the impasse continues more than twenty days, the board shall appoint a mediator or mediators representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse. The board may compel the parties to attend mediation, reasonable in time and frequency, until the fiftieth day of impasse. Thereafter, mediation shall be elective with the parties, subject to the approval of the board;

(3) Report of the board. The board shall promptly report to the appropriate legislative body or bodies the following circumstances as each occurs:

(A) The date of a tentative agreement and whether the terms thereof are confidential between the parties;

(B) The ratification or failure of ratification of a tentative agreement;

(C) The signing of a tentative agreement;

(D) The terms of a tentative agreement; or

(E) On or about the fiftieth day of impasse, the failure of mediation.

The parties shall provide the board with the requisite information; and

(4) After the fiftieth day of impasse, the parties may resort to such other remedies that are not prohibited by any agreement pending between them, other provisions of this chapter, or any other law.

(e) If an impasse exists between a public employer and the exclusive representative of bargaining unit (2), supervisory employees in blue collar positions; bargaining unit (3), nonsupervisory employees in white collar positions; bargaining unit (4), supervisory employees in white collar positions; bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule; bargaining unit (8), personnel of the University of Hawaii and the community college system, other than faculty; bargaining unit (9), registered professional nurses; bargaining unit (10), institutional, health, and correctional workers; bargaining unit (11), firefighters; bargaining unit (12), police officers; or bargaining unit (13), professional and scientific employees, the board shall assist in the resolution of the impasse as follows:

(1) Mediation. During the first twenty days after the date of impasse, the board shall immediately appoint a mediator, representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse.

(2) Arbitration. If the impasse continues twenty days after the date of impasse, the board shall immediately notify the employer and the exclusive representative that the impasse shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.

(A) Arbitration panel. Two members of the arbitration panel shall be selected by the parties; one shall be selected by the employer and one shall be selected by the exclusive representative. The neutral third member of the arbitration panel, who shall chair the arbitration panel, shall be selected by mutual agreement of the parties. In the event that the parties fail to select the neutral third member of the arbitration panel within thirty days from the date of impasse, the board shall request the American Arbitration Association, or its successor in function, to furnish a list of five qualified arbitrators from which the neutral arbitrator shall be selected. Within five days after receipt of such list, the parties shall alternately strike names from the list until a single name is left, who shall be immediately appointed by the board as the neutral arbitrator and chairperson of the arbitration panel.

(B) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position which shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement.

(C) Arbitration hearing. Within one hundred twenty days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either

in writing or through oral testimony, all information or data supporting their respective final positions. The arbitrator, or the chairperson of the arbitration panel together with the other two members, are encouraged to assist the parties in a voluntary resolution of the impasse through mediation, to the extent practicable throughout the entire arbitration period until the date the panel is required to issue its arbitration decision.

(D) Arbitration decision. Within thirty days after the conclusion of the hearing, a majority of the arbitration panel shall reach a decision pursuant to subsection (f) on all provisions that each party proposed in its respective final position for inclusion in the final agreement and transmit a preliminary draft of its decision to the parties. The parties shall review the preliminary draft for completeness, technical correctness, and clarity and may mutually submit to the panel any desired changes or adjustments that shall be incorporated in the final draft of its decision. Within fifteen days after the transmittal of the preliminary draft, a majority of the arbitration panel shall issue the arbitration decision.

(f) An arbitration panel in reaching its decision shall give weight to the following factors and shall include in its written report or decision an explanation of how the factors were taken into account:

(1) The lawful authority of the employer, including the ability of the employer to use special funds only for authorized purposes or under specific circumstances because of limitations imposed by federal or state laws or county ordinances, as the case may be;

(2) Stipulations of the parties;

(3) The interests and welfare of the public;

(4) The financial ability of the employer to meet these costs; provided that the employer's ability to fund cost items shall not be predicated on the premise that the employer may increase or impose new taxes, fees, or charges, or develop other sources of revenues;

(5) The present and future general economic condition of the counties and the State;

(6) Comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other persons performing similar services, and of other state and county employees in Hawaii;

(7) The average consumer prices for goods or services, commonly known as the cost of living;

(8) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received;

(9) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings; and

(10) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, arbitration, or otherwise between the parties, in the public service or in private employment.

(g) The decision of the arbitration panel shall be final and binding upon the parties on all provisions submitted to the arbitration panel. If the parties have reached agreement with respect to the amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund by the tenth

working day after the arbitration panel issues its decision, the final and binding agreement of the parties on all provisions shall consist of the panel's decision and the amounts of contributions agreed to by the parties. If the parties have not reached agreement with respect to the amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund by the close of business on the tenth working day after the arbitration panel issues its decision, the parties shall have five days to submit their respective recommendations for such contributions to the legislature, if it is in session, and if the legislature is not in session, the parties shall submit their respective recommendations for such contributions to the legislature during the next session of the legislature. In such event, the final and binding agreement of the parties on all provisions shall consist of the panel's decision and the amounts of contributions established by the legislature by enactment, after the legislature has considered the recommendations for such contributions by the parties. It is strictly understood that no member of a bargaining unit subject to this subsection shall be allowed to participate in a strike on the issue of the amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund. The parties shall take whatever action is necessary to carry out and effectuate the final and binding agreement. The parties may, at any time and by mutual agreement, amend or modify the panel's decision.

Agreements reached pursuant to the decision of an arbitration panel and the amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, as provided herein, shall not be subject to ratification by the employees concerned. All items requiring any moneys for implementation shall be subject to appropriations by the appropriate legislative bodies and the employer shall submit all such items within ten days after the date on which the agreement is entered into as provided herein, to the appropriate legislative bodies.

(h) Any time frame provided in an impasse procedure, whether an alternate procedure or the procedures in this section, may be modified by mutual agreement of the parties. In the absence of a mutual agreement to modify time frames, any delay, failure, or refusal by either party to participate in the impasse procedure shall not be

permitted to halt or otherwise delay the process, unless the board so orders due to an unforeseeable emergency. The process shall commence or continue as though all parties were participating.

(i) Nothing in this section shall be construed to prohibit the parties from reaching a voluntary settlement on the unresolved issues at any time prior to the issuance of an arbitration decision.

(j) The costs and expenses for mediation provided under subsection (d) or (e) shall be borne by the board. The costs and expenses for any other services performed by neutrals pursuant to mutual agreement of the parties and the costs for a neutral arbitrator shall be borne equally by the parties. All other costs incurred by either party in complying with this section, including the costs of its selected member on the arbitration panel, shall be borne by the party incurring them. [L 1970, c 171, pt of §2; am L 1978, c 108, §1; am L 1984, c 75, §1, c 219, §1, and c 254, §2; am L 1985, c 251, §5; gen ch 1985, 1993; am L 1995, c 202, §1 and c 208, §1; am L 2000, c 253, §100; am L 2001, c 90, §9; am L 2002, c 189, §1 and c 232, §3; am L Sp 2003, c 6, §1; am L 2004, c 10, §5]

Attorney General Opinions

Ombudsman has no jurisdiction over employee complaints covered by collective bargaining agreements. Att. Gen. Op. 73-6.

Law Journals and Reviews

Public Employee Arbitration in Hawaii, A Study in Erosion. 2 UH L. Rev. 477.

Case Notes

Before board, on own motion, can declare that an impasse exists, it must determine that the party claiming impasse has been negotiating in good faith. 56 H. 85, 528 P.2d 809.

Based on plain language of section and collective bargaining agreement grievance procedure, plaintiff needed to pursue any claims arising from the agreement in the administrative forum rather than in circuit court. 92 H. 268, 990 P.2d 1150.

Where employee was not the exclusive representative of an appropriate bargaining unit and, thus, subsection (a) did not confer any right to submit employee's dispute to an agreed procedure or to the board for a final and binding decision, the board was correct in dismissing employee's claim, and there was no §89-13(a)(7) prohibited practice refusal or failure to comply with chapter 89 by the employer. 97 H. 528, 40 P.3d 930.

§89-12 Strikes, rights and prohibitions. (a) It shall be unlawful for any employee to participate in a strike if the employee:

(1) Is not included in the appropriate bargaining unit involved in an impasse; or

(2) Is included in the appropriate bargaining unit involved in an impasse that has been referred to arbitration for a decision.

(b) It shall be lawful for an employee, who is not prohibited from striking under subsection (a) and who is in the appropriate bargaining unit involved in an impasse, to participate in a strike under the following conditions:

(1) The requirements of section 89-11 relating to the resolution of disputes have been complied with in good faith;

(2) The proceedings for the prevention of any prohibited practices have been exhausted;

(3) The collective bargaining agreement and any extension of the agreement has expired; and

(4) The exclusive representative has given a ten-day notice of intent to strike, together with a statement of its position on all remaining issues in dispute, to the employer and the board.

Within three days of receipt of the notice of intent to strike, the employer shall submit its position on the remaining issues in dispute that are included in the statement transmitted by the exclusive representative with its notice of intent to strike. The board shall immediately release the information on the positions of the parties to the public.

(c) If any employee organization or any employee is violating or failing to comply with the requirements of this section, or if there is reasonable cause to believe that an employee organization or an employee will violate or fail to comply with such requirements, the public employer affected shall, forthwith, institute appropriate proceedings in the circuit in which the violation occurs to enjoin the performance of any acts or practices forbidden by this section, or to require the employee organization or employees to comply with the requirements of this section. Jurisdiction to hear and dispose of all actions under this section is conferred upon each circuit court, and each court may issue in compliance with chapter 380, such orders and decrees, by way of injunction, mandatory injunction, or otherwise, as may be appropriate to enforce this section. The right to a jury trial shall not apply to any proceeding brought under this section. [L 1970, c 171, pt of §2; am L 1980, c 252, §2; gen ch 1985; am L 2000, c 253, §101; am L 2001, c 90, §§7, 10; am L 2002, c 148, §6 and c 232, §4]

Case Notes

"Dispute" in subsection (a)(2) includes disputes not only with regard to initial or renewed agreement but also with regard to grievances. 54 H. 531, 511 P.2d 1080.

Subsection (c) does not require finding of irreparable harm as a prerequisite to relief for violation of subsection (a)(2). 54 H. 531, 511 P.2d 1080.

Injunctive relief under subsection (e) is available for violations of subsection (a)(2), notwithstanding the violations are also violations of contract under §89-13; applicability of chapter 380. 54 H. 531, 511 P.2d 1080.

Civil contempt for violating order enjoining strikes. 55 H. 386, 520 P.2d 422.

Strike settlement agreements are enforced in accordance with contract law. 60 H. 361, 590 P.2d 993.

Strike settlement did not have effect of condoning an illegal strike. 60 H. 361, 590 P.2d 993.

Board had authority to order union to implement the staffing of essential positions. 66 H. 461, 667 P.2d 783.

As plaintiff was designated an "essential employee", notice plaintiff received leading plaintiff to believe plaintiff

could not strike was not a prohibited practice by employer. 87 H. 191, 953 P.2d 569.

Though designated as an "incumbent" employee, plaintiff was "essential employee" where plaintiff: (1) received notice by same means as essential employee; (2) was prohibited from striking; and (3) was subject to discipline for not working if scheduled to work during a strike. 87 H. 191, 953 P.2d 569.

§89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

(4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

(6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

(7) Refuse or fail to comply with any provision of this chapter;

(8) Violate the terms of a collective bargaining agreement;

(9) Replace any nonessential employee for participating in a labor dispute; or

(10) Give employment preference to an individual employed during a labor dispute and whose employment termination date occurs after the end of the dispute, over an employee who exercised the right to join, assist, or engage in lawful collective bargaining or mutual aid or protection through the labor organization involved in the dispute.

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

(3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement. [L 1970, c 171, pt of §2; gen ch 1985; am L 1992, c 214, §3; am L 2003, c 3, §2]

Attorney General Opinions

Unilateral wage increases by employer pending representation elections as constituting interference, restraint or coercion. Att. Gen. Op. 74-6.

Case Notes

Only interference with a lawful employee activity may be subject of a prohibited practice charge under subsection (a)(1). 60 H. 361, 590 P.2d 993.

To prove a prohibited practice under subsection (b), a conscious, knowing, and deliberate intent to violate the provisions of chapter 89 must be proven. 66 H. 401, 664 P.2d 727.

The broad policy statements within §89-1 do not impose binding duties or obligations upon any parties but, rather, provide a useful guide for determining legislative intent and purpose; these statements, therefore, do not implicate the prohibited practice provision of refusing or failing to comply with any provision of chapter 89, as set forth in subsection (a)(7); thus, employee's claim that employer violated §89-1 properly dismissed. 97 H. 528, 40 P.3d 930.

Where employee presented grievance to employer, was heard with respect thereto, and was notified that the remedy employee sought as an individual was denied, employer did not violate §89-8(b) and the board was correct in determining that, on the relevant undisputed facts, the employer was entitled to summary judgment; thus, there was no subsection (a)(7) or (8) prohibited practice violation of the collective bargaining agreement. 97 H. 528, 40 P.3d 930.

Where employee was not the exclusive representative of an appropriate bargaining unit and, thus, §89-11(a) did not confer any right to submit employee's dispute to an agreed procedure or to the board for a final and binding decision, the board was correct in dismissing employee's claim, and there was no subsection (a)(7) prohibited practice refusal or failure to comply with chapter 89 by the employer. 97 H. 528, 40 P.3d 930.

Hawaii Legal Reporter Citations

Violation of bargaining agreement. 78-2 HLR 1219.

§89-14 Prevention of prohibited practices. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization. [L 1970, c 171, pt of §2; am L 1982, c 27, §1; am L 1985, c 251, §6]

Case Notes

An action concerning prohibited practices may be brought before the board or in a court of competent jurisdiction. 2 H. App. 50, 625 P.2d 1046.

§89-15 Financial reports to employees. Every employee organization shall keep an adequate record of its financial transactions. It shall make available to all employees who pay the employee organization dues or its equivalent an annual financial report in the form of a balance sheet and an operating statement, certified as to accuracy by a certified public accountant, within one hundred twenty days after the end of its fiscal year. In the event of failure to comply with this section, an employee may petition the board for an order compelling compliance. The order shall be enforceable in the same manner as other orders of the board under this chapter. [L 1970, c 171, pt of §2; am L 1985, c 251, §7; am L 2000, c 253, §102]

§89-16 Public records and proceedings. The complaints, orders, and testimony relating to a proceeding instituted by the board under section 377-9 shall be public records and be available for inspection or copying. All proceedings pursuant to section 377-9 shall be open to the public. [L 1970, c 171, pt of §2; am L 1985, c 251, §8]

[§89-16.5] Access to personal records by an employee organization. Exclusive representatives shall be allowed access to an employee's personal records which are relevant to the investigation or processing of a grievance. The exclusive representative shall not share or disclose the specific information contained in the personal records and shall notify the employee that access has been obtained. [L 1988, c 262, §2]

§89-16.6 Disclosure to an exclusive representative. (a) The appropriate government agencies shall, upon written request, disclose to an exclusive representative information relating to the administration of payroll deductions as authorized by section 89-4, as follows: name; mailing address; social security number; bargaining unit; date of change in bargaining unit status of the employee; full-time equivalence of the employee; the employee's leave without pay status with effective dates and duration; basic

rate of pay; types and effective dates of personnel actions that affect the amount and payment of the basic rate of pay; salary scale and range or equivalent; salary step or equivalent; amounts and dates of differential pay; amounts and dates of statutory dues deductions; and amounts and dates of other authorized voluntary payroll deductions remitted to the exclusive representative; except that this provision shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency.

(b) Information disclosed to the exclusive representative under this section shall be provided within a reasonable time after receipt of the written request.

(c) An exclusive representative receiving government records pursuant to this section shall be subject to the same restrictions on disclosure of the records as the originating agency.

(d) Information disclosed pursuant to this section shall be provided in a form conducive to electronic data processing; provided the employer possesses appropriate data processing capability. [L 1990, c 250, §1; am L 1991, c 152, §1]

§89-17 List of employee organizations and exclusive representatives. The board shall maintain a list of employee organizations. To be recognized as such and to be included in the list, an organization shall file with the board a statement of its name, the name and address of its secretary or other officer to whom notices may be sent, the date of its organization, and its affiliations, if any, with other organizations. No other qualifications for inclusion shall be required, but every employee organization shall notify the board promptly of any change of name or of the name and address of its secretary or other officer to whom notices may be sent, or of its affiliations.

The board shall indicate on the list which employee organizations are exclusive representatives of appropriate bargaining units, the effective dates of their certification, and the effective date and expiration date of any agreement reached between the public employer and the exclusive representative. Copies of the list shall be

made available to interested parties upon request. [L 1970, c 171, pt of §2; am L 1985, c 251, §9]

§89-18 Penalty. Any person who wilfully assaults, resists, prevents, impedes, or interferes with any member of the board or any of its agents or employees in the performance of duties pursuant to this chapter, shall be fined not more than $500 or imprisoned not more than one year, or both. The term "agent" includes a neutral third party who assists in a resolution of an impasse under section 89-11. [L 1970, c 171, pt of §2; am L 1985, c 251, §10; am L 2000, c 253, §103]

§89-19 Chapter takes precedence, when. This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, or rules adopted by the State, a county, or any department or agency thereof, including the departments of human resources development or of personnel services or the civil service commission. [L 1970, c 171, pt of §2; am L 1994, c 56, §15]

Attorney General Opinions

Ombudsman has no jurisdiction over employee complaints covered by collective bargaining agreements. Att. Gen. Op. 73-6.

Case Notes

Mentioned with respect to applicability of chapter 380. 54 H. 531, 511 P.2d 1080.

Chapter 92F not a "conflicting statute on the same subject matter" as chapter 89, within the meaning of this section, and thus is not preempted by chapter 89 or any collective bargaining agreement negotiated under it. 83 H. 378, 927 P.2d 386.

Employee must fully exhaust the remedies covered in collective bargaining agreement before employee can bring action in circuit court. 2 H. App. 50, 625 P.2d 1046.

§89-20 Chapter inoperative, when. (a) If any provision of this chapter jeopardizes the receipt by the State or any county of any federal grant-in-aid or other

federal allotment of money, the provision shall, insofar as the fund is jeopardized, be deemed to be inoperative.

(b) The federal Pro-Children Act, as it relates to smoking at public school indoor facilities, shall preempt this chapter to the extent the federal act imposes mandatory restrictions on smoking in the workplace. [L 1970, c 171, pt of §2; am L 2004, c 87, §3]

§89-23 Classroom cleaning; exception. No collective bargaining agreement or executive policy put forth after July 1, 1993, shall contain provisions that may preclude the implementation of the classroom cleaning project established in section 302A-1507, unless a contract waiver process exists between the parties. [L 1993, c 364, §21; am L 1996, c 89, §7]